Supreme Court, U.S.
FILED
JUL 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2010

In The
Supreme Court of the United States

October Term, 1987

STATE OF CALIFORNIA, *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF AMICI CURIAE, ASSOCIATION OF CALIFORNIA WATER AGENCIES AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED..... ii

INTEREST OF AMICUS CURIAE..... 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT..... 4

I. Superimposing a Paramount Federal Riparian Right on the Established Water Right System Threatens Serious Disruption of California's Water Supply..... 4

II. Recognition of Federal Riparian Rights is Inconsistent with Congressional Policy of Deference to State Control of Water Resources and Serves No Legitimate Federal Purpose.. 9

CONCLUSION..... 11

TABLE OF AUTHORITIES CITED

Cases

California v. United States
438 U.S. 645 (1978)..... 9

In re Waters of Long Valley Creek Stream System
25 Cal. 3d 339 (1979)..... 5

United States v. New Mexico
438 U.S. 696 (1978)..... 6

Statutes

Desert Land Act
43 U.S.C., Section 321..... 9

Federal Power Act
16 U.S.C., Section 821..... 9

Federal Reclamation Act
43 U.S.C., Section 383..... 9

McCarran Act
43 U.S.C., Section 666..... 9

California Water Code
Division 2..... 9
Section 1243..... 10
Section 1243.5..... 10
Section 1257..... 10

Reports and Documents

Final Report
Governor's Commission to Review California
Water Rights Law (1978)..... 7

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INTEREST OF AMICI CURIAE

Pursuant to Rule 36 of the rules of the Supreme Court, the Association of California Water Agencies ("ACWA") and the California Farm Bureau Federation ("Farm Bureau") respectfully submit this brief amicus curiae in support of the petition for certiorari filed by the State of California and its State Water Resources Control Board. Written consent has been obtained from all parties and copies of such consents have been filed with the Clerk of the Court.

ACWA is a non-profit corporation established under California law. ACWA has as members over 350 public agencies which are responsible for supplying water for domestic, municipal, and industrial uses to eighty-five percent of California's population and for supplying irrigation water for agricultural purposes for approximately 7,000,000 acres. ACWA's members are concerned about the issues raised in this case because of the effects the decision below may have on their ability to assure adequate supplies of good quality water to meet the needs of the people of California.

Virtually all the water delivered by ACWA member agencies is obtained pursuant to appropriative rights which are, with rare exception, subordinate to riparian rights regardless of when the riparian right is first exercised. The "federal riparian right" newly recognized by the decision of the court below, and never before exercised in California, thus has tremendous potential for disruption of public water supplies and displacement of long established uses. The priority of the right, the absence of its prior exercise, and the vastness of the geography to which the right attaches together create an unprecedented threat of water supply interruption or unreliability that seriously concerns the public agencies responsible for water delivery to Californians.

The California Farm Bureau Federation is a non-profit corporation. Its membership is composed of about 90,000 voluntary dues-paying California families, through 56 local counties, organized into 53 county farm bureaus. It is the state's largest general farm organization, and is a member of the American Farm Bureau Federation, which is the nation's largest farm organization, consisting of about 3,500,000 member families from 49

states and Puerto Rico. The purpose of the Farm Bureau is to represent its members' interests on legislative, regulatory and judicial matters at the local, state and federal levels. Among those interests, and of a prime level of importance, is the availability and reliability of water supply for agriculture and related uses.

The new class of federal rights recognized by the Supreme Court in its decision below appears to change the priority of state granted rights. With nearly half of the state's land area under the control of the federal government, and about three-quarters of the state endowed with less natural precipitation than is necessary for present-day crop husbandry, the Farm Bureau anticipates substantial damage to its members' interests individually, and to the state's economy overall, as result of the decision, which it believes to be incorrect and unjustified.

SUMMARY OF ARGUMENT

For over a century, the administration and development of California's water resources proceeded on the assumption that the federal reserved right doctrine and the state administered appropriation doctrine marked the limits of the United States' rights to surface water for the vast tracts of federal land in the state. As a result, the people of California have developed sophisticated and interrelated water supply and distribution systems which take no account of potential riparian claims on federally held land.

The United States fostered or at least acquiesced in that assumption; until this case, it asserted no other rights. Congressional enactments have created and implemented a strong uniform federal policy of deference to

state control of water resource allocation and administration. Prior decisions of this Court have enforced that deference to state control. Now the California Supreme Court, based on its own interpretation of federal law, has suddenly created extensive new federal rights never before exercised. The belated awakening of this slumbering federal water giant threatens loss of state control over California water resources, jeopardizes the reliability of existing water supplies and frustrates coherent water resource planning throughout the state.

The California court's decision was legally unfounded, contrary to long established federal policy, and unnecessary to the accomplishment of federal purposes on government land. Amici believes that the legal issues arising from this case have been ably presented by petitioner State of California in its petition and need not be repeated here. This brief is submitted to acquaint the Court with the far-reaching and crippling impacts of the decision below on California water supply and water resource planning, and to demonstrate that recognition of federal riparian rights is unnecessary to the accomplishment of federal goals. ACWA and the Farm Bureau therefore urge that the Court grant the petition for certiorari to the California Supreme Court so that its judgment may be reviewed and reversed.

ARGUMENT

I

SUPERIMPOSING A PARAMOUNT FEDERAL RIPARIAN RIGHT ON THE ESTABLISHED WATER RIGHT SYSTEM THREATENS SERIOUS DISRUPTION OF CALIFORNIA'S WATER SUPPLY

Other than pueblo rights, riparian water rights are generally the paramount surface water right in California. They are not lost by non-use and, except in the rare adjudicated stream systems, their exercise automatically supplants water uses established under subordinate appropriative rights no matter how longstanding or important such uses may be. Unexercised riparian rights are thus a "trump card" in California water rights, which inherently affect California's water right administration and water supply planning with a degree of uncertainty. Even the limited degree of uncertainty in water rights occasioned by privately held riparian rights has been labelled "pernicious" by the California Supreme Court. In Re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339 (1979). The degree of uncertainty and instability threatened by the recognition of federal riparian rights, however, is geometrically greater.

The United States holds nearly half the lands in California. Much of that land is located in the mountainous regions where the state's water supplies originate and in the southern and eastern desert areas where water is scarce. Federal lands are located both upstream and downstream of the hundreds of reservoirs and thousands of diversions which serve the needs of California's large population. In either location, federal riparian claims would threaten disruption of California's water supply and distribution system. Upstream uses would render the water physically unavailable while downstream demands would make the flows legally unavailable for satisfaction of appropriative rights.

The potential uses to which federal riparian right water might be devoted vary widely. In addition to instream flows for fish and wildlife maintenance, the potential federal uses include domestic and recreational uses at

campgrounds, resorts, ranger stations and military bases, hydroelectric power generation, maintenance of valley wildlife refuges, and any other use beneficial to the riparian federal land.

A federal riparian right, automatically paramount to appropriative rights,[1] could impair long developed public and private water supplies which are based on appropriative water right permits and licenses. In fact, it is only because federal riparian rights will impair existing water rights and supplies, that it was necessary for the United States to argue so strenuously that they be recognized; other wise the United States could obtain the water it claims to need simply by applying for appropriative rights, as it has already done in many instances.

The degree of uncertainty which a federal riparian right will engender cannot be compared to the uncertainty already inherent in the State's water right system due to the recognition of private riparian rights and federal reserved rights. Its exercise and impact would be far more unpredictable and unrestricted.

The purposes for which federal reserved rights may be exercised are more limited than riparian rights; federal reserved water rights can be used only for the primary purpose of the federal reservation. United States v. New Mexico, 438 U.S. 696, 702 (1978). Moreover, many federal reserved rights are subordinate to appropriative and pri-

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[1] In an unadjudicated stream system, unexercised riparian rights are superior to existing appropriative rights. According to the judgment below, the only avenue for limiting the disruptive effect of a new exercise of a previously dormant riparian right is to prove that the new use is "unreasonable," See A-24, n.16, a difficult and uncertain undertaking in a state where the basis for a reasonableness determination has yet to be articulated. See National Audubon Society v. Superior Court, 33 Cal 3d 419, 447, n.28 (1983).

vately held riparian rights. In contrast, a federal riparian right could be used for any proper riparian purpose, regardless of its disruptive impact on other water users. The State Water Resources Control Board would be without jurisdiction to prevent or condition water use pursuant to such a right, unless the use was unreasonable or a streamwide adjudication of rights had been undertaken.

Privately held riparian rights are similarly much more limited in their impact on California's water resource picture than the asserted federal riparian right would be. As the Governor's Commission to Review California Water Rights Law found in 1978, most privately hald irrigable riparian land is already being irrigated, leaving little room for amplification of water use under such rights, See Final Report, Governor's Commission to Review California Water Rights Law, at p. 26 (1978). The same cannot be said of the potential for initiation of new water uses under a federal riparian right. Since there has heretofore been no such use, the future extent of such use is wholly unpredictable, and could be substantial.

In addition, the lands to which privately held riparian rights are appurtenant are far more limited in area than the lands to which a federal riparian right would attach. Privately held riparian rights are maximally appurtenant only to the original tract patented by the United States – tracts generally limited to no more than 160 acres per patent. Thus, even where a stream flows through a large landholding of irrigable acreage, the legally riparian lands are generally far more limited. By contrast, the federal lands for which the United States claims riparian rights are held in vast undivided chunks. The geographical limitation of use of riparian rights is thus expanded to encompass entire drainages and watersheds and be-

comes virtually no limit at all. Where the federal land embraces a stream and multiple tributaries, water from one or more tributaries could even be transported across divides for use in a distant drainage under claim of riparian rights. For these reasons, the instability resulting from recognition of a federal riparian right is different in kind and far greater in degree than the uncertainty inherent in a water right system that recognizes riparian rights in patented tracts.

If all of this uncertainty is suddenly interjected into California water law, those, such as ACWA's members, reponsible for supplying water to California's residents, industries and farms will have to reexamine the security of their present water supplies. Many of them may find it absolutely essential to develop standby sources of water in order to prevent interruptions in vital services which could be caused by the sudden exercise of riparian rights by the United States. Such development will have untold financial, social and environmental consequences.

California's currently developed water supplies are already strained under current uses. Groundwater is being overdrafted at an annual average rate of about two million acre-feet a year in order to meet current agricultural and municipal needs. Much of the state's undeveloped water supply has been placed in federal wild and scenic river status and is unavailable for development. Several cities have begun considering purchasing and retiring farmland in order to obtain more water. Inevitibly, any increase in federal water use under paramount rights will exacerbate water supply problems for the non-federal users, and will ultimately adversely impact the state's agricultural economy, either through loss of farmland or increased overdraft of groundwater supplies on which much of the state's farming and agricultural indus-

try relies. These are some of the pernicious effects which flow directly from the uncertainty in water rights created by the decision below.

II

RECOGNITION OF FEDERAL RIPARIAN RIGHTS IS INCONSISTENT WITH CONGRESSIONAL POLICY OF DEFERENCE TO STATE CONTROL OF WATER RESOURCES AND SERVES NO LEGITIMATE FEDERAL PURPOSE

The potential for the unpredictable and automatic disruption of settled water uses discussed above argues strongly against recognition of a federal riparian right; there are no such weighty policy considerations favoring such recognition.

Water for federal uses is available through the appropriation process established by Division 2 of the California Water Code. That process has long been utilized by the federal government, not only in California but throughout the West, to acquire needed water supplies without disrupting existing water allocations. While it may be administratively more burdensome for the United States to make individual applications than it would be simply to seize whatever water it desires, such a burden is consistent with the longstanding uniform federal policy of deference to state control of water resources. See, e.g., Desert Land Act, 43 U.S.C. Section 321; Federal Power Act, 16 U.S.C. Section 821; Federal Reclamation Act, 43 U.S.C. Section 383; McCarran Act, 43 U.S.C. Section 666; California v. United States, 438 U.S. 645 (1978).)

The extent to which the state administered appro-

priation doctrine is claimed to be inadequate to staisfy the water needs of the United States measures with precision the extent to which the exercise of a paramount federal riparian right is likely to impair existing water supplies. The greater the claimed inadequacy, the greater the future disruption of settled rights.

In-stream flows on federal lands are already protected under the state appropriative rights system. A proposed diversion which might impair in-stream values must be balanced by the State Water Resources Control Board against the public interest in maintaining those values and may be denied or appropriately conditioned on those grounds. California Water Code Sections 1243, 1243.5 and 1257.

Recognition of a federal riparian right would enable the federal government to ignore the State Water Resources Control Board's determination of the public interest of the people of California. Under its riparian right, the United States could independently enforce greater in-stream flows than those found by the State to be required by the public interest. Alternatively, it could deplete in-stream flows below the level which the state found necessary to protect the public interest. Moreover, because the initiation of use under a riparian right requires no state notification or approval, the United States could simply bypass all public interest consideration by the state and unilaterally determine the issue itself.

The federal government has recourse to judicial review of State Water Resources Control Board decisions with which it disagrees concerning the level of in-stream flow protection. There is no good policy reason that the United States' own judgment of the public interest in such sensitive water allocation matters should automatically prevail over that of the State Water Resources Control

Board, as would be the case if federal riparian rights are recognized.

Finally, if the United States is unable to obtain under the appropriative process or federal reserved rights the water supplies it considers essential to its needs, it has recourse to its eminent domain powers to acquire such supplies. Acquisition of water rights by condemnation is preferable to the exercise of a federal riparian right not only because condemnation compensates the holder of the acquired supply for his loss, but also because it allows the termination of the least valuable existing water use, not just the most junior use (which might, in fact, be the most valuable, economically and societally).

CONCLUSION

As can be seen from the above discussion, the only disadvantages theoretically suffered by the United States due to the absence of a riparian right are (1) the inability to oust existing uses on fully appropriated streams without payment of just compensation, and (2) the inability to disregard, or override, the state's determination of the public interest in balancing consumptive use and maintenance of in-stream flows of water in particular instances. Eliminating these "disadvantages" by recognizing a paramount federal riparian right would inject into California water rights administration and public water supplies an intolerable degree of uncertainty and instability, as well as a degree of federal intrusion into state water allocation decisions which is inconsistent with Congressional expressions of deference to state control and administration of its water resources.

Because of the potentially devastating impacts on California's water supply planning and allocation,

the Association of California Water Agencies and the California Farm Bureau Federation urge this Court to grant the requested writ of certiorari and to review the interpretation of federal law which underpins the decision below.

Respectfully submitted,

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